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In the Supreme Court of the United States

OCTOBER TERM, 1978

PHILIP A. MCLENNAN AND FRED H. BENDER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-5) is not reported. The opinion of the district court is not reported. The earlier opinion of the court of appeals is reported at 563 F. 2d 943.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1978. A petition for rehearing was denied on September 14, 1978. The petition for a writ of certiorari was filed on October 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in denying petitioners' motion for a new trial.

STATEMENT

Following a jury trial in the United States District Court for the District of Oregon, petitioners were convicted on two counts of knowingly making false statements in a matter within the jurisdiction of a department or agency of the United States, in violation of 18 U.S.C. 1001, four counts of knowingly making false statements for the purpose of influencing the action of the Department of Housing and Urban Development (HUD), in violation of 18 U.S.C. 1010, and one count of conspiring to make such false statements and to defraud the United States, in violation of 18 U.S.C. 371. Each petitioner was sentenced to three years' imprisonment and fined $40,000. Petitioners were also placed on probation for a period of five years, to commence after their release from custody. The conditions of probation included the payment of an additional $10,000 fine and the contribution of 400 hours in community service work under the direction of a probation officer. A divided panel of the court of appeals affirmed, 563 F. 2d 943 (9th Cir. 1977), and this Court denied certiorari, 435 U.S. 969 (1978).

The evidence at trial showed that petitioners, through two non-profit corporations they had formed for the purpose of constructing student housing projects, applied to HUD for loans under the College Housing Act of 1950, 12 U.S.C. 1749 *et seq.* (Pet. App. A-2 to A-3). On their loan applications, petitioners represented that all the funds earmarked for architectural services were to be paid to the project architect, Charles Dahlen; the evidence showed, however, that petitioners paid Dahlen's salary and expenses, and kept the remaining architectural funds for themselves.

On March 1, 1977, one year after their convictions, petitioners moved for a new trial. They alleged the discovery of new evidence indicating that Dahlen perjured himself at the earlier trial (C.R. 1-27).[1] Specifically, petitioners contended that Dahlen testified falsely when he said that they had provided no architectural services. To prove the alleged perjury, they offered Dahlen's subsequent deposition in a related civil case in which Dahlen stated that petitioners provided services that he valued at $138,000. The district court found that Dahlen did not commit perjury at trial and that, even if he did, petitioners knew of the falsehood at the time the testimony was given (C.R. 255-256). Accordingly, the court denied petitioners' motion for a new trial. The court of appeals affirmed (Pet. App. A-1 to A-5).

ARGUMENT

Petitioners contend that there is a conflict among the circuits concerning the proper standard for granting a new trial based on newly discovered evidence of perjury at trial. Even assuming some divergence among the approaches taken by the court of appeals, however, petitioners' motion for a new trial was properly denied. Under any of the allegedly inconsistent standards described by petitioners, the district court's finding that Dahlen did not perjure himself would be sufficient to support the refusal to grant a new trial.

Petitioners correctly state (Pet. 12) the general rule governing requests for a new trial based on newly discovered evidence. Ordinarily, a defendant must demonstrate that (1) the evidence was discovered after trial; (2) failure to learn of the evidence was not due to lack of diligence by the defense; (3) the evidence is material; and (4) the evidence would probably produce an acquittal in a new trial.[2] *E.g., United States* v. *Bryant*, 563

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[1] "C.R." refers to the Clerk's Record on appeal in this case.

[2] This is the so-called *Berry* standard, derived from *Berry* v. *Georgia*, 10 Ga. 511 (1851).

F. 2d 1227, 1231 (5th Cir. 1977), cert. denied, 435 U.S. 972 (1978); *United States* v. *Schwartzbaum,* 527 F. 2d 249, 254-255 (2d Cir. 1975), cert. denied, 424 U.S. 942 (1976). When a motion for a new trial is based on an allegation of newly discovered perjury at the earlier trial, a number of courts have adopted the more specialized test first enunciated in *Larrison* v. *United States,* 24 F. 2d 82, 87-88 (7th Cir. 1928). As petitioners indicate (Pet. 13 n.4), *Larrison* held that a new trial should be granted when (1) the court "is reasonably well satisfied" that the trial testimony of a material witness was false; (2) the jury might have reached a different verdict, were it not for the perjured testimony; and (3) the defense was surprised by the false testimony or did not know of its falsity until after trial (24 F. 2d at 87-88). See, *e.g., United States* v. *Anderson,* 509 F. 2d 312 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975); *United States* v. *Johnson,* 487 F. 2d 1278 (4th Cir. 1973); *United States* v. *Meyers,* 484 F. 2d 113 (3d Cir. 1973); *United States* v. *Briola,* 465 F. 2d 1018 (10th Cir. 1972), cert. denied, 409 U.S. 1108 (1973).

As the district court observed (C.R. 256), the *Larrison* standard, by its own terms, does not apply here. Petitioners could not have been unaware of the perjury when it occurred. The nature of the alleged perjury makes this clear. Petitioners assert that Dahlen lied when he testified that they did not provide any architectural services in connection with the student housing projects. If, as they allege, petitioners did provide such services, then they must have known Dahlen was lying at the time he lied. In no sense, therefore, may the fact of Dahlen's perjury be considered newly discovered evidence. The only thing available to petitioners now that was not available at trial is Dahlen's subsequent testimony in the civil proceeding. This is newly discovered evidence only in the sense that it arguably provides new support for petitioners' attack on Dahlen's credibility, not in the sense that it makes petitioners aware of facts they previously

did not know. In short, the *Larrison* test is simply inapplicable to the circumstances of this case.

Petitioners nevertheless allege a conflict among the circuits on the basis of *United States* v. *Stofsky,* 527 F. 2d 237, 245-247 (2d Cir. 1975). In *Stofsky,* as here, an important part of the defense at trial was a challenge to the credibility of a leading government witness. Also as in the present case, the evidence discovered after the trial in *Stofsky* simply helped to corroborate the position taken by the defendants when the government witness first testified, namely, that critical portions of the witness' testimony were false. In this situation, the court of appeals rejected the *Larrison* test and applied the general rule for granting a new trial on the basis of newly discovered evidence. Under the latter standard, the court held that the defendants were not entitled to a new trial. As the Second Circuit's opinion indicates (*id.* at 245-246), it is not at all apparent from the reported decisions that courts purporting to apply *Larrison* would have reached a different result.

Even if there were a theoretical conflict between *Stofsky* and the line of cases following *Larrison,* the disagreement would have no bearing on the disposition of petitioners' motion for a new trial. *Larrison* requires that a court be "reasonably well satisfied" that the trial testimony of a material witness was false. The district court here was not satisfied that Dahlen perjured himself. Thus, even if *Larrison* applies when a defendant already knows that a witness had lied and then discovers further evidence of the perjury, it would not help petitioners, because the district court found that no perjury occurred. Likewise, if the proper standard is the one applied in *Stofsky,* petitioners' new trial motion was properly denied. The district court's conclusion that Dahlen's testimony was truthful necessarily implies that his testimony in the subsequent civil proceeding would have been unlikely to produce an acquittal, had it been available at trial. And, under the

ordinary rule correctly stated by petitioners (Pet. 12), a new trial will not be granted on the basis of newly discovered evidence unless that evidence would probably produce an acquittal.

United States v. *Johnson*, 327 U.S. 106, 111-112 (1946), held that neither this Court nor the courts of appeals should "review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact." The Court acknowledged that an "appellate court might intervene when the findings of fact are wholly unsupported by evidence," but it emphasized that there should be no such intervention "where it does not clearly appear that the findings are not supported by any evidence." *Ibid.* The Court explained that it is "important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances" (*id.* at 111).

Here the record provides ample support for the district court's conclusion that the "newly discovered evidence" presented by petitioners does not prove that Dahlen lied at trial. The primary issue at trial was whether petitioners had performed sufficient architectural services to entitle them to a substantial portion of the architectural fees. Dahlen testified at trial that while petitioners "didn't provide what you would classify as, specifically, architectural services" (Tr. 226), they did give Dahlen the benefit of their prior experience in student housing construction and, in connection with the first two dormitory projects, they did provide Dahlen with drawings made by another architect before Dahlen was hired (Tr. 304-305, 311-312). Dahlen also testified that one of petitioners' employees assisted him in preparing the documents and reports required by HUD (Tr. 339). Dahlen's deposition testimony in the later civil proceeding merely assigns an

approximate dollar value to the services provided by petitioners and outlined by Dahlen at trial. Both at trial and in his later deposition, Dahlen stated that the services performed by petitioners were those normally the responsibility of the owner or contractor, and that he, Dahlen, had performed virtually all the architectural services, with only minor assistance from petitioners (Tr. 337-339; C.R. 93, 103). Dahlen's deposition testimony was consistent with his testimony at trial, and the district court correctly found that petitioners did not prove perjury.[3] Moreover, even if petitioners' allegations of perjury were accepted for the sake of argument, the figures from Dahlen's deposition testimony cited by petitioners (Pet. 7) indicate that they were entitled to approximately $140,000 for architectural services rendered, not the $600,000 that petitioners admittedly received (Pet. 5) from the HUD funds earmarked for architectural services.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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[3]Because there was no perjury, petitioners' additional argument (Pet. 16-19) based on *Mesarosh* v. *United States*, 352 U.S. 1 (1956), and *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956), is without merit. In those cases the government acknowledged that newly discovered evidence cast substantial doubt on the veracity of critical testimony at defendants' trial or in the relevant administrative proceedings. Here, no perjury occurred, and the government does not concede that the "newly discovered evidence" proffered by petitioners raises any significant question about the truthfulness of Dahlen's testimony.

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